

\$~20

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 7054/2016**

% **Reserved on:** 18th January, 2017
Date of Decision: 31st May, 2017

DHARMENDRA KUMAR Petitioner
Through Dr. K. S. Chauhan, Mr. Murari Lal,
Mr. Ajit Kumar Ekka & Mr. Ravi
Prakash, Advocates
Versus
UNION OF INDIA & ORS. Respondents
Through Mr. Sanjeev Narula, CGSC & Mr.
Abhishek Ghai, Advocate for UOI

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.

The petitioner-Dharmendra Kumar has filed the present writ petition impugning the order dated 18.04.2016 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (herein after referred to as Tribunal) whereby O.A. No. 3533/2014, has been dismissed on the ground of res judicata.

2. It is stated that the Tribunal has committed a grave error by holding that the O.A. is barred by res-judicata, without appreciating the facts of the case on merits and ignoring that a fresh cause of

action arose due to passing of order dated 05.03.2013 by which the juniors of the petitioner were regularised and confirmed whereas the petitioner was left out. Even otherwise, the cause of action is a recurring cause of action and denial of the relief on the ground of the res-judicata in the present case is wrong and unjust. The respondents cannot be allowed to perpetuate and commit illegality by granting benefit of regularisation to those junior to the petitioner. The petitioner has worked as a temporary employee for the last 21-22 years. Accordingly, he is legally entitled to regularisation in the backdrop of Articles 14 and 16 of the Constitution of India. Counsel for the petitioner has relied upon letter F. No. CCIT/CCA/KNP/24/2008-09/G-73 dated 19.12.2008 issued on the basis of the instructions vide DOPT O.M. No.49019/1/2006-Esst.(C) dated 11.12.2006 which stipulates that the government and their instruments should take steps to regularise as one time measure contractual employees who duly qualify in terms of statutory requirements and have completed 10 years or more in duly sanctioned posts. Learned counsel for the petitioner has submitted that the petitioner is legally entitled to the benefit of the policy letter dated 19.12.2008 issued by the respondents. Reliance has also been placed on the decision of this Court in W.P.(C) No.8081/2012 tilted as *Union of India Vs. Raj Kumar* wherein it has been held that a senior cannot be ignored for a benefit if such benefit is conferred on his junior.

3. The petitioner had sought the following relief in the O.A. No. 3533/2014:-

“(a) Summon the records of the case.

(b) Pass an appropriate order, direction or writ in the nature of certiorari or any other appropriate writ, quashing/modifying the order dated 05.03.2013 with all consequential benefits, in the interest of justice and in the facts and circumstances of the present case; and

(c) Pass an appropriate order, direction or writ in the nature of mandamus or any other appropriate writ, directing the official respondents to modify the order dated 05.03.2013 and thereby incorporating the name of the humble applicant in the said order, with all consequential benefits, in the interest of justice and in the facts and circumstances of the present case; and

(d) Pass an appropriate order, direction or writ in the nature of certiorari or any other appropriate writ modifying the order dated 05.03.2013, in terms of letter/order dated 05.02.1998 with all consequential benefits, in the interest of justice and in the facts and circumstances of the present case; and

(e) Pass such other further order(s) as this Hon’ble Tribunal may deem fit and proper in the facts and circumstances of the present case.”

4. The petitioner has not denied and accepts that he was one of the co-applicants in OA No. 842/2009 and had sought relief of regularisation which is identical to the prayer made in 3533/2014. OA No. 842/2009 was dismissed and this order was not challenged by the petitioner. In these circumstances the Tribunal is right in holding that OA 3533/2014 was not maintainable and was barred by *res judicata*.

5. The petitioner has not denied the fact that he was one of the co-applicants in O.A. No. 842/2009 who had sought relief of regularisation, as was the prayer in OA No. 3533/2014. OA No. 842/2009 was dismissed as being bereft of merits. A perusal of the prayer clause in OA No. 3533/2014 would show that the petitioner, by means of the aforesaid OA, had sought relief which had already been considered and rejected by the Tribunal in the earlier OA No. 842/2009.

6. Two of the co-applicants in OA No.842/2009, namely Lala Ram and Kanhaiya Lal had filed W.P.(C) 13013/2009 in the High Court of Delhi against the order of the Tribunal dated 31.07.2009 dismissing the aforesaid OA. The aforesaid writ petition was allowed on 10.09.2010 and following order was passed:-

“18. Accordingly, we allow the writ petition and set aside the impugned order dated 31.07.2009, OA No. 842/2009 filed by Lala Ram and Kanhaiya Lal (alone) is allowed. Mandamus is issued to the respondents to forthwith regularize the services of Lala Ram and

Kanhaiya Lal w.e.f. 30.01.2009 i.e. the date when services of 88 daily wagers were regularized.

19. Petitioners would be entitled to all consequential benefits w.e.f. 30.01.2009.

20. Petitioners are also held entitled to cost which we determine in sum of Rs.10,000/-

21. Copy of this decision be sent to Secretary Finance, Government of India, who is expected to look into the matter and ensure that the Income Tax Department functions by and under the Rule of Law and not by the Rule by law.”

7. The petitioner herein did not approach this Court by way of a writ petition, nor did he seek any other remedy challenging the aforesaid order dated 31.07.2009 in O.A. No. 842/2009. Hence, the order of the Tribunal has attained finality against him. The aforesaid order of the High Court passed on 10.09.2010 would not enure to the benefit of the petitioner. In these circumstances the respondent did not regularise the services of the petitioner.

8. In *Mahant Prem Dass Chela Mahant Bhola Dass Vs. Joti Pershad*, AIR 1971 Del 282, it has been held that an issue tried in a previous suit shall not be retired in a subsequent suit by the principle of res-judicata. Importance or otherwise of the issue in question would be wholly irrelevant. In considering the applicability of Section 11 of the Civil Procedure Code, 1908,(CPC, 1908, for short) the court has only to see the matter

which was directly and substantially in issue in the earlier suit between the parties and the decision thereon.

9. In ***R. Vishawanthan Vs. Rukn-Ul-Mulk Abdul Wajid*** AIR 1963 SC 1, the Supreme Court has held that the principle of res judicata as incorporated in Section 11 of the CPC, 1908 is of a much wider sweep and would include even an issue and principle of constructive res-judicata, whereas Section 12 of the CPC, 1908 only deals with conclusiveness of the judgment alone and the right claimed must have been decided.

10. The Supreme Court in ***Gangappa Gurupadappa Gugwad Gubarga Vs. Rachawwa***, (1970) 3 SCC 716, has held that if the final decision is based on a decision of more than one point each of which by itself would be sufficient for the final decision, the decision on each point would operate as res-judicata. The said principle was earlier applied in ***Vithal Yeshwant Jathar Vs. Shikhandarkhan Makhtumkhan Sardesai***, AIR 1963 SC 385.

11. Further, the Supreme Court in ***State of M.P. Vs. Col. Sardar Chandroji Rao***, 1969 1 SCWR 366, has held that if a point is not urged in appeal and an adverse decision is given, then the urging of the same point a second time would be barred by the principle of constructive res-judicata.

12. Learned counsel for the petitioner has relied upon the case of ***N. R. Narayan Swamy Vs. B. Francis Jagan***, (2001) 6

SCC 473, where the Supreme Court has relied on its previous decisions in *K.S. Sundararaju Chettiar Vs. M. R. Ramachandra Naidu* (1994) 5 SCC 14, *Surajmal Vs. Radheyshyam* (1988) 3 SCC 18, and *Vallabh Das Vs. Dr. Madan Lal*, (1970) 1 SCC 761.

13. On the question whether the bar of *res judicata* would apply, we are in agreement with the Tribunal. Once an issue has been tried and decided on merits and the decision has attained finality, the same issue cannot be raised in subsequent suits/proceedings in view of the principle of *res judicata*. The matter directly and substantially in issue in a previous suit/proceedings, upon being decided on merits, cannot become the subject-matter of a second suit/proceedings.

14. However, the question would arise whether the petitioner is remediless and has completely forgone and lost his right to claim regularisation. The petitioner submits that both Lala Ram (S. No. 88) and Kanhaiya Lal (S. No. 89) were junior to him. Though we do not accept their regularisation would confer a new or fresh cause of action, so as to obliterate the effect of the judgment dated 31.07.2009 in OA No. 842/2009, we would observe and hold that the petitioner is at liberty to question and challenge the order dated 31.07.2009 dismissing OA No. 842/2009. If any such Writ Petition is filed, the same would be decided in accordance with law keeping in mind the constraints faced by the petitioner, who is uneducated and has limited access to courts of law. Perhaps because of wrong legal advice the

petitioner had filed OA 3533/2014 rather than challenge order dated 31.07.2009 passed in OA No. 842/2009.

15. Thus, while we find no infirmity or flaw in the impugned order dated 18.04.2016, it is clarified that the petitioner would be at liberty to question and challenge the order dated 31.07.2009 passed in OA 842/2009 and if such Writ Petition is filed, the prayer made by the petitioner would be considered and examined in accordance with law.

16. Observing the same, the present writ petition stands dismissed. There would be no order as to costs.

**(CHANDER SHEKHAR)
JUDGE**

**(SANJIV KHANNA)
JUDGE**

MAY 31, 2017/b